



PAUL FARROW

STATE REPRESENTATIVE

June 2, 2011

Mr. Chairman and Members of the Committee,

Thank you for the opportunity to speak to you on behalf of AB 124. Currently there is what may be considered loophole in the state statutes that would allow an individual who receives a service from a retail vendor, like massage therapy, and salons. Currently the statute differentiates between "services" and "moveable property".

The prominent case that brought this issue to light occurred in 2006 when Marshall Wolbers of Lake Bluff, IL came to Wisconsin and received \$400 worth of spa services from Azana Salon and Spa of Brookfield. Wolbers left without paying for these services. He was caught, but the Waukesha county District Attorney's office declined to prosecute Wolbers because the theft was a service not defined as "Moveable property". In March of 2007 Wolbers was arrested in IL for a similar situation. IL has a theft of services provision in their statutes.

This legislation is presented to close the discrepancy currently existing in Wisconsin's statutes. Theft is a crime. There should not be a difference between a moveable property and service rendered. There are many small businesses that provide a service under the assumption that the customer will pay for that service. The legal system should be changed to cover them. This bill has been before the legislature before in 2007-08 session. It passed the Assembly on a voice vote and was approved by the Senate Judiciary Committee on a 5-0 vote. Unfortunately it did not make it to the floor before the session ended.

I am asking for your support today to allow retailers who provide services to receive the same support under the law as those who sell moveable property.

Thank you for your time.

Sincerely,

SERVING WAUKESHA COUNTY'S 98TH ASSEMBLY DISTRICT



**STATE OF WISCONSIN
DEPARTMENT OF JUSTICE**

**J.B. VAN HOLLEN
ATTORNEY GENERAL**

**Kevin M. St. John
Deputy Attorney General**

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Executive Assistant**

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Madison, WI 53707-7857
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TO: Members of the Assembly Committee on Criminal Justice and Corrections

FR: Mark Rinehart, Legislative Liaison

DT: June 2, 2011

RE: 2011 Assembly Bill 124, relating to theft of services

Dear Representatives:

The Department of Justice has reviewed AB 124 and its companion SB 85 creating, within §943.50, a broad new category of retail theft. The Department shares the following for your consideration. DOJ shared this memo with the Senate committee that considered SB 85 last week.

AB 124 adds a new crime to the set of offenses covered under §943.50, namely intentionally failing or refusing to pay a service provider for services obtained with intent to permanently deprive the provider of the full price of the service, where there is no written contract.

§943.50 further authorizes a merchant (service provider) to physically detain a customer awaiting law enforcement while providing immunity from prosecution if "acting in good faith."

Penalties

The bill establishes penalties for theft of services under the retail theft statutes to a maximum of a Class G felony. Current law already makes it a crime to defraud motels, restaurants, theaters, taxicabs, gas stations or "recreational attractions" by obtaining goods or services without paying for them. Wis. Stat. § 943.21(1m). If the amount at issue under that law is less than \$2500, the offense is a misdemeanor; otherwise it constitutes (up to) a (Class I) felony. Wis. Stat. § 943.21(3)(am). Thus, there is some discrepancy between the proposed law and existing law.

Scope

In contrast to the existing set of defined offenses under §943.21(1m), the new offense created under §943.50 is sweeping. It appears to apply to nearly every type of transaction in which a consumer purchases goods or services, including transactions where a service provider comes to a consumer's home, and transactions where a consumer may not be informed of the "price" until the service has been completed.

The Bill will impact Wisconsin consumers.

As drafted, the bill would criminalize consumers with good-faith, legitimate complaints (disputes) about the charges being demanded by service providers, and would prevent them from asserting legitimate challenges to shoddy, not-as-represented, incomplete and injurious or destructive work. These concerns are different when a service, rather than a product is involved, as consumers are unlikely to purchase a product that appears to be defective or unsuitable. With a service, however, the consumer may not fully understand what he or she is being asked to pay for until the work is completed. Additionally, service providers often make decisions about what services need to be performed, together with recommended changes whereas, with products, a consumer is in a better position to pick and choose what he or she wants to buy. Finally, a defective or unsuitable product can often be exchanged or returned with no net loss to the provider. Services, however, generally cannot be undone. This makes it more likely that a demand for payment, and a refusal to pay, will be the end result of a dispute.

A further ramification is turning ordinary debtors into criminals when the person simply lacks the ability to pay a bill. A person receiving emergency medical treatment at a hospital may be presented with a \$50,000 bill that he or she is unable to pay prior to discharge. Is the person "intentionally failing or refusing to pay" the bill when they either lack the means to pay or dispute part of the bill? If so, their nonpayment would be a crime under AB 124.

Even in cases where the price was understood or agreed to in advance (although there was no written contract), there can be many reasons for disputes arising. For example, a plumber charges the going rate for unclogging a drain, but did an incompetent job so that the drain still doesn't work; or the plumber in the course of doing the job damaged the homeowner's house or property and refuses to compensate the homeowner. AB 124 would force one party to the dispute—the consumer—to surrender their rights, while protecting the other, even if there is a legitimate basis for the refusal to pay the full price.

Notably, even if the homeowner paid all but \$20 of the bill to cover damage caused by the plumber, the homeowner is still committing a crime under AB 124 because they are refusing the pay "the full price of the service." Or, suppose the plumber easily accomplishes the task in 15 minutes, then demands \$1,000 as payment (assume the going rate is \$100). If the homeowner refuses to pay the exorbitant amount demanded, AB 124 would criminalize this refusal. Ironically, under the bill the plumber's blatant price-gouging would **not** be a crime, but the homeowner's justified refusal to pay would be. And if the plumber demands more than \$2,500, the homeowner would be committing a felony.

In this context, the relatively narrow scope of §943.21(1m), which currently protects motels, restaurants, theaters, taxicabs, gas stations and "recreational attractions" has a clear nexus as those businesses are either required by law to post prices or regularly do so.

Even if prosecutors declined to prosecute cases where non-payment is due to a legitimate dispute or an inability to pay, predatory service providers like the plumber would be able to threaten the consumer with prosecution. This threat may work to intimidate consumers into paying the unreasonable charges, thus empowering fraudsters and predators seeking to fleece consumers.

The Bill is inconsistent with settled contract law principles.

AB 124 will impact settled contract law by limiting consumers' rights to legitimately dispute charges,

by criminalizing their refusal to pay the full stated price.

The bill may apply to transactions in which there is a "stated price" known to the consumer in advance of the provision of services, or to transactions in which the price is not stated until after the services have been provided. If the intent was to limit the bill to prices stated in advance, a more narrow scope may be necessary to remove the ambiguity.

On the other hand, if the intent is to cover prices stated after the fact, the bill would destroy the common law contract principles that protect purchasers of goods or services where there is no price specified in advance. Under common law, if there is a contract which does not specify a price for the goods or services provided, the price imposed must be "reasonable," and if there is a dispute the court is the ultimate arbiter.

Such "open price-term contracts" are common. They exist, for example, when the plumber or electrician makes a repair, when a physician or hospital provides medical services, or when a repair shop fixes an appliance or a vehicle without a fixed price. Without the rule of a reasonable price, the provider of the service could gouge consumers by charging unreasonable—even exorbitant—amounts protected by the criminal law. Unfortunately, there are unscrupulous individuals who prey upon consumers in just this manner.

And even if the price is stated in advance, if the merchant fails to adequately perform the contract (e.g. by performing in a shoddy manner, by injuring the consumer or the consumer's property, etc.) under established contract law principles the purchaser is not necessarily obligated to pay the agreed-upon price. By imposing an absolute obligation to pay—regardless of the quality of the service—AB 124 is inconsistent with settled legal principles.

Homeowner Rights

AB 124 makes lawful the physical detention of a consumer by an adult employee of the service provider or presumably the service provider him or herself. This would not be limited to a public building or place or business and could be construed to include one's home or any place a service is provided. This would interfere with a person's established right to demand that someone leave their property and may result in persons being lawfully detained physically by non-law enforcement virtually anywhere a service is provided.

Prosecutor and Law Enforcement Resources

By creating a broad new category of crimes, the bill also will increase the workload of district attorney offices. Even if, as one could expect, many prosecutors would be reluctant to charge under the new law, there could nonetheless be a substantial number of service providers demanding that they do so and expending valuable prosecutor time discussing what are essentially contract or consumer disputes.

Local law enforcement can expect increased calls for service responding to newly criminalized activity or behavior with the potential that a citizen may be holding another citizen in custody.

Technical

As a drafting matter, a reconciliation with the Unified Commercial Code (UCC) may be necessary. The current bill draft does not alter §943.50(1)(a), which incorporates the definition of "merchant" in the Uniform Commercial Code (UCC) (402.104(3)), plus innkeepers, etc. That definition, however, is limited to the sale of goods—not services. But AB 124 bill defines "service provider" as "a *merchant*

(under the UCC) who provides a service to retail customers." Proposed §943.50(1)(am). However, a merchant (under the UCC definition) cannot be a provider of services, as opposed to goods.

Finally, even if the intent of the bill is clarified to cover only transactions in which a price is stated in advance, the problem remains that consumers will be prevented or deterred from challenging unreasonable charges even when there is a legitimate basis for disputing the obligation to pay the stated-in-advance full price.

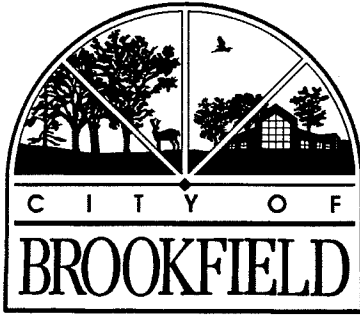
If the purpose of the bill is to address particular problem behaviors similar to those in the existing statute, we urge and would welcome the opportunity to work with the authors and the committee to narrow and focus the bill upon those specific behaviors.

Limiting non-law enforcement custody actions to business locations may wish to be considered. Recommending or requiring merchants or service providers to state the price in advance and receive written approval (thus creating a contract) may be an optional course. Or, as a business practice, merchants and service providers may wish to require payment or down payment in advance to avoid exposure to losses short of criminal penalties.

There is no doubt some citizens engage in fraud or fail to pay for goods and services. This behavior, regrettably, causes difficulty for both small and large businesses and results in losses to hard working law abiding merchants. In the end, this impacts all consumers with higher prices to prevent and recover losses. Thankfully, there are mechanisms under current law to address many of these behaviors.

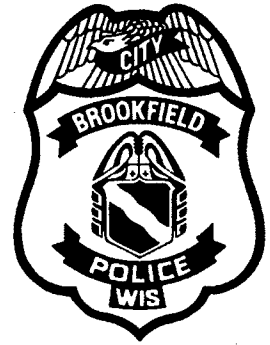
The Department would like to be of assistance as you consider these matters.

Thank you.



POLICE DEPARTMENT

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Administrative Fax (262) 796-6701
Daniel K. Tushaus, Chief of Police



June 2, 2011

Rep. Garey Bies
Chairman, Assembly Committee on
Criminal Justice and Corrections
Box 8952
Madison, WI 53708-8952

Re: **AB-124/SB-85, Theft of Services**

Dear Rep. Bies:

As a result of several unusual thefts in southeastern Wisconsin, I attempted to gain passage of a theft of services bill in the last legislature. Unfortunately, the bill died on the last day of the session when a vote was not scheduled in the senate. Hence, 2011 AB-124 was introduced by Representatives Farrow, Kleefisch, Brooks, and several other legislators. This bill would create a theft of services section within the general theft statutes. Several of the day spas in southeastern Wisconsin (including my city) were plagued by a suspect who would obtain various spa services, e.g. massages, waxes, manicures, etc. and then flee without paying. Our district attorney advised us that no charges could be issued under the existing theft statutes since no "movable property" was stolen, just 'services'.

This lacuna in the law now allows the prosecution only of thieves who might steal a bottle of shampoo but not if the shampoo was applied to the suspect's hair. Similarly one could obtain a haircut, permanent, massage, or hair braiding and then just refuse to pay. There is currently no Wisconsin statute which forbids this novel type of theft. That is why I am seeking the passage of 2011 AB-124 and its companion bill SB-85. (Illinois already has a theft of services statute.) The victims of these thefts are generally low income service workers who can least afford the losses these suspects are now causing.

If AB-124/SB-85 is passed, almost none of the theft of services suspects would be prosecuted using State resources: prosecutors, public defenders, judges, probation agents, etc. These cases would be handled almost exclusively in municipal courts as are other small value theft cases. These small dollar amount cases are now almost always handled in municipal courts as ordinance violations and not in circuit court as crimes. Many municipalities have already adopted the State's criminal code by reference. Hence, most theft offenses in the State's criminal code are currently prosecuted as municipal civil offenses punishable only by a monetary forfeiture.

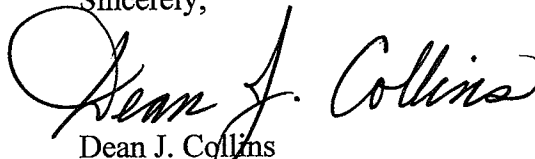
ADDRESS ALL CORRESPONDENCE TO THE CHIEF OF POLICE



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Therefore, I am urging your support of AB-124/SB-85 to move this bill forward to passage. Please contact me at the below number should you have any questions on this matter. Again, it is the 'little people' in service enterprises that suffer without any redress unless AB-124 is passed.

Sincerely,

A handwritten signature in black ink that reads "Dean J. Collins". The signature is written in a cursive style with a large, looped initial "D".

Dean J. Collins
Assistant Chief of Police

(262) 787-3567